UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
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ISOCHEM NORTH AMERICA, LLC,	**)**	**Docket No. TSCA-02-2006-9143**
	)	
Respondent.	**)**	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION AND ON RESPONDENT'S CROSS-MOTION TO AMEND ANSWER AND TO DISMISS THE COMPLAINT AND ORDER SCHEDULING HEARING

I. Procedural Background

This action was initiated on March 21, 2006 by an Administrative Complaint filed against ISOCHEM North America, LLC ("Respondent" or "Isochem"), by Complainant United States Environmental Protection Agency ("EPA"), Region 2, for violations of Section 15(3)(B) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2614(3)(B). The Complaint, as now pending, alleges in one count that Respondent failed to timely submit its 2002 "Partial Updating of the Inventory Data Base Production and Site Report," known as a "Form U," as required by 40 C.F.R. § 710.33(b), in regard to 19 chemical substances Respondent manufactured and/or imported in excess of 10,000 pounds during the relevant period. Specifically, the Complaint alleges that Respondent failed to submit a Form U by the deadline of December 23, 2002, for 14 chemicals that were manufactured and/or imported at Respondent's New Jersey facility ("NJ Facility"), and five chemicals that were manufactured and/or imported at a facility owned by Respondent in Texas ("Texas Facility"), during Respondent's latest complete fiscal year ending prior to August 25, 2002, that is, calendar year 2001. The Complaint alleges that each of these chemical substances not reported constitutes a separate violation of Section 15(3)(B) of TSCA, and Complainant proposes a penalty of $18,700 for each violation, for a total proposed penalty of $355,300.[1]

Respondent, through counsel, filed an Answer to the Complaint on June 2, 2006. Subsequently, the parties were offered an opportunity to participate in this Tribunal's Alternative

[1] The Complaint as originally filed contained three counts and sought a combined total penalty of $399,300. However, on October 20, 2006, Complainant moved to withdraw Counts 2 and 3 of the Complaint, and this request was granted by Order dated November 20, 2006.

Dispute Resolution process, but failed to respond to said offer, and the case was directly assigned to an Administrative Law Judge for hearing.[2] Thereafter, on July 7, 2006, a Order Establishing Prehearing Proceedings was issued and in response thereto the parties submitted their Prehearing Exchanges in or about August 2006. Certain pre-hearing motions were later filed and ruled upon.

Respondent submitted an Amended Answer on November 13, 2006. In both its original Answer and Amended Answer Respondent admitted allegations that it currently owns and operates the NJ Facility, that it previously owned and operated the Texas Facility, that it manufactured and/or imported more than 10,000 pounds of the 19 chemicals listed in the Complaint in its 2002 fiscal year, and that it submitted a Form U for those chemicals on or about November 22, *2004*. *See*, Amended Answer ¶¶ 8, 17, 18, 23. In both the Answer and Amended Answer, Respondent stated that it "objects to and disagrees with the conclusions of law" that its actions constitute violations of TSCA, set forth a series of affirmative defenses, and requested a hearing. Amended Answer ¶¶ 25, 40-74.[3] In the Amended Answer, however, Respondent added the "affirmative defense" of inability to pay the proposed penalty.

On March 14, 2007, Complainant filed a Motion for Accelerated Decision on Liability (C's Motion). Respondent did not timely respond by the due date set forth in the applicable procedural rules, 40 C.F.R. Part 22. After motions for extension and denial of Complainant's motion for default, on April 19, 2007 Respondent submitted a Response in Opposition to the Motion for Accelerated Decision and Cross-Motion to Amend Answer and to Dismiss the Complaint (R's Opp. & Cross Motion). After its motion for extension of time to reply was

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[2] This case was initially assigned to Judge Carl C. Charneski for hearing and, upon his resignation from the Agency, was reassigned on April 9, 2007 to the undersigned.

[3] Only the first five and last of Respondent's eight affirmative defenses raised in its Amended Answer are directed to Count 1, the remaining live count in this action. *See*, Amended Answer ¶¶ 40-74. Of those six "affirmative defenses," the following four pertain to liability: (1) the Inventory Update Rule, of which 40 C.F.R. § 710.33(b) is part, does not include a "clearly-stated provision" to impose civil penalties for its violation; (2) the Agency is estopped from asserting the alleged violations based upon a four-year reporting interval by having determined that such requirement imposed an "onerous" burden and switching to a five year reporting interval; (3) the Notice of Inspection extended to sales, personnel and research data in violation of 15 U.S.C. § 2610(b)(2); and (4) that Respondent maintained the requisite records and "[i]f and to the extent Respondent failed to submit Form U . . . [by] December 23, 2002, such failure was the result of clerical error" of which Complainant was aware by November 30, 2004, and the commencement of this action is therefore barred by 40 C.F.R. § 710.1. The other two pertain only to a penalty assessment: (1) that the proposed penalty fails to take into proper account the factors set forth in 15 U.S.C. § 2615(a)(2)(B) and follows the "dictates of the inflexible framework of the EPA TSCA Penalty Policy;" and (2) that Respondent does not have the ability to pay the proposed penalty. *See*, Amended Answer ¶¶ 40-66, 73-74.

granted and its second motion for default was denied, Complainant on May 11, 2007 filed its Memorandum of Law in reply to Respondent's Opposition and in response to the Cross-Motion (C's Reply). On June 26, 2007, Respondent filed a Reply to the Consolidated Response of Complainant concerning the Motion and Cross-Motion (R's Reply).

II. Relevant Statutes and Regulations

Section 5(a) of TSCA, 15 U.S.C. § 2604(a) requires a person who manufactures a new chemical substance, or manufactures or processes any chemical substance for a significant new use, to submit to EPA a notice of intention to manufacture or process the substance ("premanufacture notification"). The term "manufacture" is defined in Sections 3(7) and 8(f) of TSCA, 15 U.S.C. §§ 2602(7) and 2607(f), as to manufacture, import into the United States, or produce, for commercial purposes. The term "chemical substance" is defined in Section 3(2), 15 U.S.C. § 2602(2), and 40 C.F.R. § 710.3, as any organic or inorganic substance of a particular molecular identity, with certain exceptions. Section 8(a) of TSCA, 15 U.S.C. § 2607(a), requires EPA to promulgate regulations "under which each person (other than a small manufacturer or processor) who manufactures or processes" or proposes to do so, "shall maintain such records, and shall submit to [EPA] such reports" as EPA may reasonably require. Section 8(b) of TSCA, 15 U.S.C. § 2607(b), requires EPA to "compile, keep current, and publish a list of each chemical substance which is manufactured or processed in the United States." This list of chemical substances is referred to as the Chemical Substance Inventory ("Inventory").

Accordingly, EPA promulgated the TSCA Chemical Inventory Regulations at 40 C.F.R. Part 710, governing reporting and recordkeeping by certain persons who manufacture, import or process chemical substances for commercial purposes under Section 8(a) of TSCA. EPA periodically amends the TSCA Inventory to include new substances reported under Section 5(a) of the Act, and revises categories of chemical substances. The TSCA Chemical Inventory Regulations include requirements as to the update of information on a subset of substances on the Inventory, and are therefore referred to as the "Inventory Update Rule." The Inventory Update Rule was amended in 2002, so 40 C.F.R. part 710 subpart B governs inventory update activities prior to January 1, 2003, and subpart C governs such activities after that date. 40 C.F.R. § 710.1.

The Inventory Update Rule requires a report on a Form U during the period from August 25 to December 23, 1990, and at four-year intervals thereafter, by "[a]ny person who manufactured for commercial purposes 10,000 pounds . . . or more of a chemical substance described in § 710.25 at any single site owned or controlled by that person at any time during the person's latest complete corporate fiscal year before August 25, 1990, or before August 25 at four-year intervals thereafter." 40 C.F.R. §§ 710.28(b), 710.33, 710.39. "[T]he site for a person who imports a chemical substance . . . is the site of the operating unit within the person's organization which is directly responsible for importing the substance and which controls the import transaction." 40 C.F.R. § 710.28(c). Section 710.25 states that chemical substances for which information must be reported are "[a]ny chemical substance which is in the Master Inventory File at the beginning of a reporting period" unless specifically excluded by Section 710.26. Certain persons who qualify as a "small manufacturer" defined in 40 C.F.R. § 704.3 are

not required to report. 40 C.F.R. § 710.29. The person who must report "must submit the information prescribed in this section for each chemical substance . . . that the person manufactured for commercial purposes in an amount of 10,000 pounds . . . or more at a single site . . . ." 40 C.F.R. § 710.32. The Rule states that "[a]ny person described in § 710.28(b) must report during the appropriate reporting period for each chemical substance described in § 710.25 that the person manufactured during the applicable corporate fiscal year . . . ." 40 C.F.R. § 710.33(b).

Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B), provides that "[i]t shall be unlawful for any person to . . . fail or refuse to . . . submit reports, notices or other information . . . as required by this chapter [Chapter 53, Toxic Substances Control, 15 U.S.C. §§ 2601-2692] or a rule thereunder . . . ." Section 16 of TSCA, 15 U.S.C. § 2615, provides that any person who violates a provision of Section 15 is liable for a civil penalty.

III. Factual Background

Respondent is a Delaware limited liability company that owns, operates and/or controls the NJ Facility, located at 101 College Road East, Princeton, New Jersey 08540, which imports and re-sells chemicals, some of which are "chemical substances" regulated under TSCA. Complaint and Amended Answer ¶ 8; R's Opp. & Cross Motion at 2.

Respondent imported more than 10,000 pounds of each of fourteen chemical substances at its NJ Facility for commercial purposes during Respondent's latest complete corporate fiscal year ending prior to August 25, 2002. Complaint and Amended Answer ¶ 17; Declaration of Michael Bious dated March 12, 2007 ("Bious Declaration") ¶ 10; R's Opp. & Cross Motion at 2. These chemical substances are as follows: 2 Ethyl Hexyl Chloroformate, Benzyl Carbazate, Butyroyl Chloride, Diethyl Carbonate, Dimethyl Carbonate, Ethyl Chloroformate, Hexanoyl Chloride, Isonanoyl Chloride, Lauroyl Chloride, Methyl Chloroformate, n-Butyl Isocyanate, Pivaloyl Acetonitrile, Trimethylacetylchloride, and Propargyl Butyl Carbamate ("14 Chemicals"). Complaint and Amended Answer ¶ 17; Bious Declaration ¶ 10.

On November 17, 2004, EPA representatives, including Michael Bious, who is an EPA chemist, conducted an inspection of the NJ Facility to determine Respondent's compliance with TSCA and the Inventory Update Rule. Complaint and Amended Answer ¶¶ 9, 10.
When Mr. Bious arrived at the facility, Daniel M. Slick, Respondent's Chief Executive Officer (CEO), signed the Notice of Inspection. Respondent's Prehearing Exchange Exhibit ("RX") 3. During the inspection, it was determined that Respondent had not submitted its 2002 Form U. Respondent's Prehearing Exchange Statement at 1. Prior to 2002, Respondent's fiscal year was the calendar year. Complaint and Amended Answer ¶ 14.

A few days after the inspection, on November 22, 2004, Mr. Slick submitted a Form U, dated November 17, 2004, listing the 14 chemicals identified above. Complaint and Amended Answer ¶ 23; RX 4; Bious Declaration ¶ 15. On the same date, Mr. Slick submitted a Form U,

also dated November 17, 2004, listing five chemical substances, namely: 2-ethylhexyl Chloriformate, Diethyleneglycol Chloroformate, Dimethyl Cabonate, Neodecanoyl Chloride, and Trimethyl Acetylchloride ("Five Chemicals"). Complaint and Amended Answer ¶¶ 18, 23; Bious Declaration ¶ 15.

IV. Arguments of the Parties

Complainant's Motion requests an accelerated decision declaring Respondent liable for 19 separate and distinct violations of TSCA and the Inventory Update Rule, 40 C.F.R. Part 710. The Motion asserts that there is no genuine issue of material fact on the question of Respondent's liability for its admitted failure to timely report the 19 chemicals for the 2002 update of the TSCA Inventory, and that Complainant is entitled to judgment as a matter of law as to Respondent's liability for each of the alleged violations. Complainant asserts that the admissions in Respondent's Amended Answer and statements in the Bious Declaration establish the elements for Respondent's liability for each of the 19 chemicals. Complainant points out that the Bious Declaration confirms that Respondent had not previously reported the chemicals for the TSCA Inventory, as the Declaration states that Mr. Slick during the inspection explained to Mr. Bious that he was unable to locate reports for 2002, and that when Mr. Slick contacted EPA to locate a copy of the reports, EPA had no record of them. Bious Declaration at ¶ 17. The Bious Declaration (at ¶¶ 14, 20- 22, 24) also confirms that each of the 14 Chemicals and Five Chemicals was on the TSCA Inventory as of August 25, 2002, and not excluded under 40 C.F.R. § 710.26 or de-listed. Complainant also cites to Administrative Law Judge decisions which support a determination of a separate and distinct violation for each chemical which was required to be reported but was not reported on a Form U. *Atlas Refinery, Inc.*, EPA Docket No. TSCA-02-99-9142, 2000 EPA ALJ LEXIS 12 (ALJ, Feb. 16, 2000); *Caschem, Inc.*, EPA Docket No, II TSCA-PMN-89-0106, 1992 EPA ALJ LEXIS 146 (ALJ, Oct. 30, 1992); *GCA Chemical Corp.*, EPA Docket No. TSCA-4-2000-0130, 2002 EPA ALJ LEXIS 38 n. 1 (ALJ, June 18, 2002).

Respondent asserts that the Motion is predicated on two false assumptions: (1) that Isochem "owned, operated and/or controlled" the Texas Facility, and (2) that Isochem was required to file a Form U. Respondent states that the first assumption "derives in part from Respondent's editing errors in its initial Answer, errors that carried forward into its Amended Answer." R's Opp. & Cross Motion at 1. The second assumption, Respondent states, "derives from Complainant's misunderstanding or misinterpretation of Isochem's financial data." *Id.* Respondent asserts that the evidence contradicts both assumptions, and compels denial of Complainant's Motion, granting of Respondent's Cross Motion to amend its Answer, and dismissal of the Complaint or the portion thereof concerning the Texas Facility.

In support of its argument as to the falsity of the first assumption that Isochem "owned, operated and/or controlled" the Texas Facility, Respondent presents the Declaration of its CEO Daniel M. Slick, dated April 18, 2007 (Slick Declaration), in which Mr. Slick asserts that Respondent never owned, operated or controlled the Texas Facility, and that Dow Chemical Company ("Dow") owned the site, but that sometime prior to 2002, SNPE Chemicals, Inc.

("SNPE Chemicals"), a separate wholly-owned subsidiary of SNPE, Inc., leased the site from Dow to construct the Texas Facility, and then owned the Texas Facility until SNPE Chemicals went out of business in 2002, after which Dow disassembled the Texas Facility. *Id.* ¶¶ 4-9. Mr. Slick states that Mr. Bious made statements attributed to Mr. Slick that are incorrect, which he assumes resulted from misunderstanding parts of the conversation during the inspection. Slick Declaration ¶ 17. Mr. Slick's discussion of the Texas Facility was about SNPE Chemicals, not Isochem, Mr. Slick states. *Id.* ¶ 18.

Respondent asserts that it "added to the confusion by inadvertently and incorrectly 'admitting' the allegations" in the paragraphs of the Complaint pertaining to the Texas Facility. R's Opp. & Cross Motion at 3. Respondent presents a Declaration of its counsel, Jon Schuyler Brooks, Esq., dated April 17, 2007 ("Brooks Declaration"), in which Mr. Brooks states that the Answer and Amended Answer contain editing errors of inadvertently and incorrectly admitting that Respondent formerly owned, operated and/or controlled the Texas Facility. Brooks Declaration ¶ 3-4. He states that he became aware of the errors on March 13, 2007 during a conference call with Complainant's counsel, during which Mr. Brooks made Complainant's counsel aware of the errors and desire to amend the Answer to correct them, Mr. Brooks asserts. *Id.* ¶ 5.

Respondent argues that a party is not bound by admissions made in pleadings where the party explains the error in a subsequent pleading or by amendment, citing *Sicor, Ltd. v. Cetus Corp.*, 51 F.3d 848, 859-60 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 170 (1995) and *Provident Energy Assoc. v. Bullington*, 77 Fed. Appx. 427, 430 (9th Cir. 2003)(unpublished). Through Respondent's efforts to correct the error in the conversation on March 13, 2007 and the pending Cross Motion to amend the Answer, Respondent urges, the admissions regarding the Texas Facility must be deemed nullified. Mr. Slick's Declaration, Respondent argues, raises a genuine issue of material fact as to its liability.

As to the second allegedly false assumption - that Isochem was required to file a Form U, Respondent argues that Complainant must prove that Respondent does not qualify as a small manufacturer, because the regulation defining who must file a Form U, 40 C.F.R. § 710.28, provides, "[e]xcept as provided in §§ 710.29 and 710.30, the following persons are subject to this subpart," and Section 710.29, in turn, provides that a person is not subject to the subpart "if that person qualifies as a small manufacturer." In that Complainant has neither alleged nor proven that Respondent is not a small manufacturer, Respondent asserts, Complainant's Motion for accelerated decision must be denied.

Respondent moves to amend its Amended Answer to conform to the evidence, to correct Paragraphs 8 and 18 to deny rather than admit Isochem owned, operated and/or controlled the Texas Facility and manufactured chemicals there, and to add an affirmative defense that Isochem is a small manufacturer, "in an excess of caution" in the event it is determined to be an affirmative defense rather than an element of Complainant's case. R's Opp. & Cross Motion at 7.

Further, Respondent moves to dismiss the entire Complaint on the basis that Respondent is a small manufacturer/importer because in 2001 it met the "First standard" for a small manufacturer in that "its total annual sales . . . [were] less than $40 million" as set forth in 40 C.F.R. § 704.3. R's Opp. & Cross Motion at 8. Respondent points out that the term "total annual sales" is defined in 40 C.F.R. § 704.3 as "the total annual revenue (in dollars) generated by the sale of all products of a company." Acknowledging that the term "products" is not defined in TSCA or the regulations, Respondent relies on the definition of "production volume" which is "the quantity of a substance which is produced by a manufacturer . . . ," and the definition of "substance," which is a chemical substance or mixture, and reasons that "products of a company" means the chemical substances or mixtures manufactured and/or imported by the company. R's Opp. & Cross Motion at 9-10. In his Declaration, Mr. Slick indicates that Respondent's gross total sales in 2001 were just over $41.3 million, which includes more than $5.3 million from sales of chemicals manufactured by other U.S. companies, which were neither imported nor manufactured by Respondent. Slick Declaration ¶¶ 13-14. Mr. Slick asserts that Respondent's parent company, is SNPE, Inc., a Delaware corporation which is a holding company, thus having no sales revenue. *Id.* ¶¶ 3, 15. Subtracting the $5.3 million that are not revenues from its "products," Respondent calculates that its 2001 total annual sales were less than $36 million. R's Opp. & Cross Motion at 10; Slick Declaration ¶ 14. Respondent notes that, in the event this argument is successfully challenged, it reserves its right to argue that the $36 million includes sales of non-TSCA regulated chemicals, such as pharma chemicals, which would reduce the figure further. R's Opp. & Cross Motion at 10 n. 1.

As an alternative basis for dismissing the Complaint, Respondent argues that the definition of "small manufacturer" in Section 704.3 provides an inflation index by which EPA must adjust the $40 million limit. *Id.* at 10. Respondent argues that its total annual sales were less than the $40 million plus an adjustment for the "inflation index" set forth in Section 704.3. Respondent asserts that the applicable Producer Price Index (PPI) increased by 25%. Respondent reasons that because Section 704.3 requires EPA to use the PPI to determine the need to adjust the total annual sales values and prohibits EPA from adjusting it unless the PPI has changed more than 20%, and because EPA adjusted maximum penalties under TSCA § 16 for inflation, EPA was obligated to adjust the total annual sales values for the 2002 reporting period from $40 million to $50 million. As Respondent's 2001 gross sales were less than $50 million, Respondent asserts it was exempt from the filing requirements as a small manufacturer.

Respondent also asserts that the request for judgment as to the number of violations, *i.e.*, that Respondent is liable for 19 violations, goes not to liability but to "damages." Opp. & Cross Motion at 2.

In its Reply, Complainant argues that Respondent is not entitled to withdraw admissions made in pleadings and to amend its Answer, that Respondent waived the small manufacturer issue, and that therefore Respondent has not raised any genuine issue of material fact. C's Reply at 4. Complainant points out that where Respondent intends to withdraw an admission, amend the answer to reflect the withdrawn admission and request dismissal of the Complaint based thereon, case law for amending an answer as well as for summary judgment applies. *Id.* at 20-

22. Complainant argues that the Declarations submitted by Respondent do not adequately explain the genesis of or the facts underlying the alleged editing errors, that Respondent should have been aware of any facts underlying the small manufacturer exemption and Texas Facility issues prior to this litigation, and that 40 C.F.R. § 710.29 gives notice of the exemption. Complainant asserts that raising the issues so belatedly, after failing to do so in the Answer, Amended Answer and Prehearing Exchange, prejudices Complainant as it foreclosed Complainant from obtaining discovery to probe these issues and denied it an opportunity to adequately prepare for hearing, or, if additional discovery were granted at this point, it would significantly delay this proceeding. *Id.* at 32, 35, 37-39, 57-59. Complainant asserts that statements in the Declarations presented by Respondent are conclusory and self-serving, a sudden and unexplained last-minute change of position, and thus, citing to case law in support, do not create a genuine issue of material fact. C's Reply at 22. Furthermore, Mr. Slick's statement that Isochem never owned, operated and/or controlled the Texas Facility, and that it was owned by SNPE Chemicals, does not indicate who controlled the Facility in 2001. *Id.* at 29. Complainant presents a Declaration of Mr. Bious dated May 1, 2007 ("Bious Reply Declaration"), in which Mr. Bious states that Mr. Slick affirmed during the inspection that SNPE North America ("SNPE NA") was associated with the Texas Facility. Bious Reply Declaration ¶ 11. Thus, the Slick Declaration does not negate the possibility that SNPE NA, Respondent's predecessor-in-interest, controlled the Texas Facility. *See*, Exhibits 1 and 2 attached to Reply Bious Declaration (Groupe SNPE website printout indicating, *inter alia*, Respondent was formerly known as SNPE NA, with same address and contact).

Furthermore, Complainant asserts that the small manufacturer exemption should be deemed an affirmative defense, as Respondent has conceded the same by moving to add it as an affirmative defense, and argues that "[s]uch an alleged exemption should be deemed the type of defense 40 C.F.R. § 22.15(b) requires a respondent to raise in its answer . . . ," including an affirmative defense within the meaning of Federal Rule of Civil Procedure 8(c). C's Reply at 42-44. Complainant points to case law holding that ordinarily, failure to plead an affirmative defense results in waiver of the defense, and holding that courts may entertain the defense upon motion for summary judgment under the standard for amending pleadings, including lack of prejudice to the opposing party, or where circumstances exist that excuse the failure to timely raise the defense. *Id.* at 45-57.

Complainant additionally argues that Mr. Slick's Declaration establishes that in 2001 Respondent did not qualify for the small manufacturer exemption, as he admitted that Respondent had $41.3 million in total sales. The $5.3 million in sales of domestic products cannot be excluded from "total annual sales," because its definition in Section 704.3 and relevant Federal Register rule preambles make clear that sales of *all* products are to be included, citing 51 Fed. Reg. 21438, 21445 (June 12, 1986); 49 Fed. Reg. 45245 (Nov. 16, 1984). *Id*. at 59-61. Even accepting Respondent's theory that its 2001 total annual sales was $36 million, it would not qualify as a small manufacturer, Complainant argues. First, Mr. Bious states, as supported by Groupe SNPE's 2004 and 2005 Annual Reports, that Respondent's French parent company is Groupe SNPE, which has sales far exceeding $40 million. C's Reply at 62; Bious Reply Declaration ¶¶ 30-34 and Exhibits 3, 4 and 5 attached thereto. Second, under 40 C.F.R. § 704.3,

where a manufacturer has total annual sales between $4 million and $40 million, it does not qualify for the exemption if its production or importation volume for a chemical substance exceeds 100,000 pounds, and seven chemical substances reported for Respondent's NJ Facility, and four at the Texas Facility, were manufactured (imported) in amounts above 100,000 pounds. C's Reply at 63; Bious Reply Declaration ¶¶ 37-38. Thus, even accepting Respondent's theory, eleven alleged violations are still viable. As to Respondent's argument that EPA was required to adjust the total annual sales figure, Complainant argues that the text of Section 704.3, and the preamble to the final rule, 49 Fed. Reg. 45425 (Nov. 16, 1984), make clear that EPA is not obligated to make an adjustment, but may do so in its discretion. C's Reply at 64-65.

In its Reply, Respondent emphasizes the presiding judge's responsibility to "assure that the facts are fully elicited," as required by the procedural rules, 40 C.F.R. § 22.4(c). Respondent suggests that "there may be even greater ease amending administrative proceedings than civil proceedings." R's Reply at 3. In support, Respondent cites *Yaffe Iron & Metal Co., Inc. v. U.S. EPA*, 774 F.2d 1008 (10th Cir. 1985), in which the Tenth Circuit stated that "administrative pleadings are 'liberally construed' and 'easily amended,'" and noted the "unimportance" of pleadings in the administrative process. Respondent argues that it has not engaged in "undue delay, bad faith or dilatory motive" and, citing *Zaclon, Inc.*, EPA Docket No. RCRA-05-2004-0019, 2006 EPA ALJ LEXIS 19 *9 (April 21, 2006)(Order Denying Motion to Amend Complaint), identifies three criteria for evaluating prejudice: hardship to the moving party if the request is denied, the reason for the movant's failure to include the information in the initial pleading, and harm to the opposing party if the motion is granted. As to the first criterion, Respondent asserts that denial of the motion to amend the answer would deny it from obtaining any satisfactory relief, as Complainant's motion for accelerated decision would be granted.

As to the second criterion, Respondent asserts that it intended to deny that it owned, operated and/or controlled the Texas Facility and that it was a small manufacturer. R's Reply at 5. In support, Respondent presents another declaration of its counsel, Jon Schuyler Brooks, Esq. dated June 2, 2007 ("Brooks Reply Declaration) ¶ 4. In this Declaration, Mr. Brooks asserts that only when he received proposed stipulations did he become aware that the Answer and Amended Answer failed to deny the Texas Facility allegations, and then immediately disclosed that there was an inadvertent error to Complainant's counsel during the March 13, 2007 conference. Brooks Reply Declaration ¶¶ 6, 7, 13.

Respondent argues that it did not include the small manufacturer issue in its Answer because it believes Complainant bears the burden of proof on this issue. R's Reply at 6. In support, Respondent cites to an excerpt from the preamble to the final rule addressing the small manufacturer exemption stating:

> EPA has selected exemption criteria that represent readily available data. These data enable identification of companies which would be likely to qualify for an exemption. The standards can also be easily enforced, because the selected criteria will enable EPA to monitor compliance with the exemption.

49 Fed. Reg. 45427 (Nov. 16, 1984). Respondent argues that if the small manufacturer issue were an affirmative defense, EPA need not identify companies likely to qualify for, or monitor compliance with, the exemption. Respondent argues that when it received a proposed stipulation from Complainant, stating that "Regulations . . . set forth at 40 C.F.R. § 710 require manufacturers and importers of chemical substances (other than those exempted under 40 C.F.R. § 710.29) to report to EPA . . . ," Respondent's counsel raised the small manufacturer issue with Complainant's counsel during the March 13, 2007 conference because the latter may be misled if Respondent simply accepted the proposed stipulation. R's Reply at 7; Brooks Reply Declaration ¶¶ 17, 18.

As to the third criterion, Respondent contests Complainant's allegations of prejudice, asserting that the hearing has not yet been scheduled, and that Complainant knew since October 2004 that SNPE Chemicals owned the Texas Facility, and knew Isochem was known as SNPE NA, yet did not request any discovery. R's Reply at 8.

Moreover, Respondent presents another declaration of its CEO Mr. Slick, dated June 22, 2007 (Slick Reply Declaration), which states, *inter alia*, that neither SNPE NA nor Isochem owned, operated and/or controlled the Texas Facility, nor owned any interest in SNPE Chemicals, which owned and controlled the Texas Facility. Mr. Slick indicates there was a misunderstanding with Mr. Bious as to whether SNPE NA was associated with the Texas Facility. Slick Reply Declaration ¶ 8. He states that in his haste to fill out the Forms U, he filled out the one for the Texas Facility improperly by inserting "Isochem NA LLC" for the company name, thinking that it was the name of the company for which he worked rather than the company that owned or controlled the Texas Facility. *Id.* ¶ 17. Mr. Slick explains further that he put the name of SNPE Chemicals as the "plant site" on the form, and similarly put the name Isochem NA LLC as the plant site for the New Jersey Facility, designating the company that owned each respective site. *Id.* ¶¶ 17-18. He explains that SNPE Chemicals went out of business in 2002, and therefore it had no stationery or official, and therefore he used Isochem Groupe SNPE stationery and signed both transmittal letters for the separate Forms U for the New Jersey and Texas Facilities. *Id.* ¶¶ 20-21. He states that Groupe SNPE is not a company but a name applied collectively to a French company (SNPE S.A.), its subsidiaries, and their operating companies. *Id.* ¶ 9.

Respondent also asserts that the 2002 Form U for the Texas Facility specifies that the five chemicals reported were manufactured, not imported. Respondent asserts that Complainant had access to its financial documents since July 2006, and thus knew that Respondent's 2001 sales revenue barely exceeded $40 million and could have anticipated that the small manufacturer issue would be raised.

Respondent argues that Complainant's interpretation of "total annual sales" would result in absurdities, such as a company manufacturing 99,000 pounds of 1,000 chemicals per year at $0.40 per pound would be exempt as a small manufacturer with total annual sales of $39.6 million, but a company manufacturing 110,000 pounds of one chemical that sells at $0.40 per pound for a total of $44,000 annually, but whose parent company sells candy exceeding $4

million annually, would be required to file the Form U.

Respondent asserts that EPA is obligated to invoke the Inflation Index to adjust the small manufacturer exemption threshold, noting that EPA had raised the threshold between issuance of the proposed and final rule addressing the exemption, based on the PPI. Respondent asserts that EPA committed itself to make adjustments, as the preamble to the final rule states that inflation will have an "ongoing impact on the ability of the sales parameter to accurately reflect a company's financial resources" and that "[a]djustments will be made only when a new reporting rule is being promulgated and a significant amount of inflation [20% or greater PPI increase] has occurred since the most recent previous adjustment of the exemption values." R's Reply at 12 (quoting 49 Fed. Reg. at 45428, 45429). Between 1984 and 2001, EPA promulgated at least six new reporting rules, and the applicable PPI rose 50%, which is thus "significant." EPA ignored its obligation to increase the $40 million threshold, and does not explain the discrepancy between its use of the inflation index to increase penalties and its refusal to use an inflation index for exempting small manufacturers. R's Reply at 13.

Respondent also sets forth arguments contesting assessment of multiple penalties for failure to file a Form U.

V. Respondent's Request for Oral Argument

Respondent requests oral argument on the Complainant's motion for accelerated decision and Respondent's Cross Motion. Complainant states that it does not believe that oral argument is necessary, but does not oppose the request.

The Rules of Practice provide that this Tribunal "may permit oral argument on motions in its discretion." 40 C.F.R. § 22.16(d). Looking to Federal court practice for guidance, it is noted that a district court "should have 'wide latitude' in determining whether oral argument is necessary before rendering summary judgment." *Bratt v. International Business Machines Corp.*, 785 F.2d 352, 363 (1st Cir. 1986). "Where affidavits . . . and other documentary material indicate that the only issue is a matter of law, and where the briefs have adequately developed the relevant legal arguments, it is not error to deny oral argument," whereas oral argument is appropriate where the motions for summary judgment depend on "difficult questions of law and alleged questions of fact." *CIA.Petrolera Caribe, Inc. v. Arco Carribean, Inc.*, 754 F.2d 404, 411 (1st Cir. 1985). It is appropriate to deny oral argument on a motion for accelerated decision where the motion, responses and supporting material clearly show that there is a genuine issue of material fact. Therefore, oral argument is particularly suitable and productive for complex matters of law, or mixed questions of law and fact, that are not fully elucidated by the written materials supplied.

The discussions presented in the Motion, Opposition and Cross Motion and Replies are thorough and sufficiently explain the issues raised. An oral argument would not be of any significant assistance in resolving these issues. Respondent's request for an oral argument is

therefore denied.

VI. Standards for Amending an Answer and Judicial Admissions

Admissions in an answer constitute binding judicial admissions, except where the admission was due to fraud or mistake. *Marathon Enterprises v. Schroter GmbH & Co.,* 01 Civ. 0595 (DC), 2003 U.S. Dist. LEXIS 2274 * 11 (S.D.N.Y. 2003); *Ferguson v. Neighborhood Housing Services of Cleveland*, 780 F.2d 549, 551 (6th Cir. 1986)(judicial admissions are binding and not reopened except where there is a showing of exceptional circumstances). Failure to plead an affirmative defense in the answer generally results in a waiver of that defense, but this rule is "not applied automatically and as a practical matter there are numerous exceptions to it." *American Federal Group, Ltd. v. Rothenberg*, 136 F.3d 897, 910 (2nd Cir. 1998)(quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1278 at 491 (2nd ed. 1990). Where a party finds that an admission in the answer is a mistake, or where it wishes to add an affirmative defense, the party generally moves to amend its answer.

The general rule for amending administrative pleadings is that they are "liberally construed and easily amended." *Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992)(quoting *Yaffe Iron & Metal Co., Inc. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985)). Motions to amend an administrative pleading are analyzed under the standard applied in Federal court for amendment of pleadings: "[i]n the absence of ... undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party ... [or] futility of amendment," leave to amend pleadings should be allowed. *Foman v. Davis*, 371 U.S. 178, 181-182 (1962). The burden is on the party opposing the amendment to show prejudice, bad faith, undue delay or futility. *Chancellor v. Pottsgrove School Dist.*, 501 F. Supp. 2d 695, 700 (E.D. Pa. 2007).

The criterion of futility challenges the legal sufficiency of the amendment. *Nesselrotte v. Allegheny Energy, Inc.*, Civ. No. 06-01390 2007 U.S. Dist. LEXIS 79147 *16 (W.D. Pa., Oct. 25, 2007). A proposed amendment is futile if it could not withstand a motion to dismiss. *Warner-Lambert v. Teva Pharms, USA,* 289 F. Supp. 2d 515, 544-545 (D. N.J. 2003)(denying as futile defendant's motion for leave to amend answer to add additional inequitable conduct defense, because plaintiff would be entitled to summary judgment in its favor on the defense). ; *Med Graphics Corp. v. Hartford Fire Ins. Co.*, 171 F.R.D. 254, 257 (D. Minn. 1997)(leave to amend answer should be denied if proposed defenses are legally insufficient so as to invite a motion to strike under FRCP 12(f)).

The most significant of the *Foman* factors is whether the amendment would unduly prejudice the opposing party. *Carroll Oil Company*, RCRA (9006) App. 01-02, 2002 EPA App. LEXIS 14 * 38 (EAB, July 31, 2002). Undue prejudice may exist even where the motion to amend is filed before the deadline for filing such motions. *Id.*(ALJ did not abuse discretion in denying motion to amend complaint to add the president of the corporate respondent and a

related company as respondents, where motion was filed within motions deadline but only six weeks before the hearing, which would need to be postponed if amendment was granted). Undue prejudice has been discussed as follows:

> [N]early every amendment results in some prejudice to the non-moving party. New discovery and some delay inevitably follow when a party significantly supplements its pleadings. The test in each case, then, must be whether *undue* prejudice would result. The district court, in exercising its discretion, must balance the general policy behind [FRCP] Rule 15 that controversies should be decided on the merits--against the prejudice that would result from permitting a particular amendment. Only where the prejudice outweighs the moving party's right to have the case decided on the merits should the amendments be prohibited.
> * * *
> In balancing these interests, the court will consider the position of both parties and the effect the request might have on them. Thus, the court will inquire into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material to be added in the original pleading, and the injustice resulting to the party opposing the motion should it be granted.

McCann v. Frank B. Hall & Co., 109 F.R.D. 363, 365, 1986 U.S. Dist LEXIS 29844 (N.D. Ill. Jan. 30, 1986)(citing, *inter alia*, *Alberto-Culver Co. v. Gillette Co.,* 408 F. Supp. 1160, 1161 (N.D. Ill. 1976) and 6 Wright, Miller & Cooper, Federal Practice & Procedure § 1487 at p. 429 (2nd ed. 1990).

Injustice resulting to the opposing party which weighs against granting a motion to amend may result from need for additional discovery, delayed litigation, or presentation of new legal theories shortly before trial, with attendant legal costs and burdens to the opposing party. *Carroll Oil*, 2002 EPA App. LEXIS 14 * 42. As quoted by the Environmental Appeals Board (EAB), "[p]arties to litigation have an interest in the speedy resolution of their disputes without undue expense. Substantive amendments just before trial are not to be countenanced." *Id.** 40-41 (quoting *Feldman v. Allegheny Int'l Inc.*, 850 F.2d 1217, 1225 (7th Cir. 1988). However, "[t]he need for additional discovery does not conclusively establish prejudice." *Nesselrotte v. Allegheny Energy, Inc.*, Civ. No. 06-01390 2007 U.S. Dist. LEXIS 79147 *14-15 (W.D. Pa., Oct. 25, 2007)(no prejudice where trial date was not set, case was less than a year old, and additional discovery could be worked into case schedule). Prejudice that is sufficient to deny a motion to amend a pleading must be such that the non-moving party was "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." *Bechtel v. Robinson*, 886 F.2d 644, 652 (3rd Cir. 1989)(quoting *Heyl & Patterson Int'l v. F.D. Rich Housing*, 663 F.2d 419, 426 (3rd Cir. 1981).

Matters of prejudice and avoidance of undue delay may constitute sufficient, independent reasons for denying an amendment to a pleading. *Carroll Oil*, 2002 EPA App. LEXIS 14 n. 17. Yet they are often related, as it has been held that the crucial factor is not the length of the delay but whether prejudice would result. *United States v Pend Orielle Public Utility District No. 1*,

926 F.2d 1502, 1511 (9th Cir. 1991). The longer the unexplained delay, the less that is required of the nonmoving party to show prejudice. *Block v. First Blood Associates*, 988 F.2d 344, 350 (2nd Cir. 1993); *King v. Cooke*, 26 F.3d 720, 724 (7th Cir. 1994)("The longer the delay, the greater the presumption against granting leave to amend . . . . when extreme, delay itself may be considered prejudicial."). Not only should the burden to the opposing party be taken into account, but also the burden to the court from protracted litigation which harms the other litigants who must wait longer in the court queue. *Carroll Oil*, 2002 EPA App. LEXIS 14 * 42.

As to the movant's reasons for failing to include the matter in the original pleading, where courts find that failure to include an affirmative defense was inadvertent, they have granted motions to amend an answer to include the affirmative defense. *Gottfried v. Illinois Central RR*, No. 94 C 5249, 1995 U.S. Dist. LEXIS 159 (N.D. Ill., Jan. 9. 1995)(motion to amend to add affirmative defense granted where party failed to reallege affirmative defense after transfer of venue and where parties engaged in discovery on the affirmative defense in prior proceeding).

Similarly, where courts find that a party's admission in its answer was inadvertent, they have granted motions to amend the answer to deny the allegation. *Marathon Enterprises v. Schroter*, 2003 U.S. Dist. LEXIS 2274 * 11-12. When a party seeks to amend its answer to deny an allegation that it admitted in the original answer, claiming that the error was inadvertent, courts look at the documents in the case file to determine whether they are consistent with such claim of inadvertence.[4] For example, where a party, after the opposing party filed a motion for summary judgment, moved to amend its answer to change its admission of an allegation to a denial, contending that it was clarifying its position and that the opposing party should have known that the movant contested the allegation, but where other documents it filed did not mention arguments consistent with denial of the allegation, the court found that the movant was attempting to change its position in order to pursue new arguments, and therefore denied the motion to amend. *Crest Hill Land Dev., LLC v. City of Joliet*, No. 03 C 3343, 2004 U.S. Dist. LEXIS 9453 *7 (N.D. Ill., May 24, 2004), *aff'd*, 396 F.3d 801, 804 (7th Cir. 2005). In that case, the court denied the motion to amend although there was hardship to the moving party by summary judgment being granted against it, and although there was no significant delay, as the motion to amend was filed only five months after the original answer was filed and one month after discovery closed. The Seventh Circuit stated, "'Surprises' such as new arguments or defense theories propagated after the completion of discovery and filing of summary judgment are wisely discouraged." *Id.*, 396 F.3d at 804.

On the other hand, where courts find that an attorney made an inadvertent error in admitting an allegation, and documents in the file support this finding, they have granted

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[4] In some cases, courts may find that the party has attempted to amend its pleading in bad faith or with a dilatory motive, rather than for the alleged reason of correcting an inadvertent error. Thus, the inquiry into the reasons for failing to include the material in the original pleading relates to the *Foman* factors of bad faith and dilatory motive.

motions to amend an answer to deny the allegation. *Tradex Corp. v. Ernst*, No. 87 C 2196, 1987 U.S. Dist. LEXIS 10275 (N.D. Ill. 1987)(granting leave to amend answer, finding party made inadvertent mistake of admitting allegation in original answer where party denied allegation elsewhere in the answer and otherwise made clear that he was denying the allegation); *Wilmarth v. McKenzie*, Civ. No. 5:05CV227, 2007 U.S. Dist. LEXIS 32467 (W.D. N.C., May 2, 2007) (defendant's motion to amend answer granted, plaintiff's motion for summary judgment denied, and defendant's admission of allegation was found inadvertent where it was inconsistent with and contradictory to denials of other allegations, and where defendant's filings and consistent intent to contest the issue showed that admission was inadvertent). Where a party admitted an allegation in one part of an answer but denied it in another part, and its arguments on a motion for summary judgment and its "spirited defense" were consistent with denial of the allegation, the court found that the party made an inadvertent mistake and granted its motion to amend the answer. *Marathon Enterprises v. Schroter*, 2003 U.S. Dist. LEXIS 2274 * 11-12. In *King v. Cooke*, 26 F.3d 720, 724 (7th Cir. 1994), the court granted defendants leave to amend the answer to change factual admissions to denials three years after the original answer was filed, and after two deadlines for amending pleadings had passed, where the defendants asserted that the admissions were the result of wordprocessing errors which did not come to their attention until after the opposing party's motion for judgment on the pleadings was filed based on the admissions. The court found that the admissions contrasted sharply with their affirmative defenses, prayer for relief, and statements in other documents filed, and noted that the opposing party could not genuinely be surprised by the motion to amend nor claim to have relied upon the admissions.

Courts also have granted motions to amend an answer although there were no documents establishing that the admission of the allegation was inadvertent, where the court found that the opposing party was not prejudiced. *Lanahan v. Kawasaki*, 93 F.R.D. 397, 399 (D. Nev. 1982) (motion to amend answer granted where defendant asserted that he inadvertently admitted an allegation and promptly, one month later, moved to amend answer). In *Jornigan v. N.M. Mutual Casualty Co.*, 228 F.R.D. 661, 2004 U.S. Dist. LEXIS 28147 (D. N.M., May 25, 2004), the court found that the attorney's motion to amend was to correct an inadvertent mistake in admitting an allegation, noting that the attorney disclosed to the opposing counsel by letter the mistake the same day he learned of it and one day after a stay of discovery was lifted, and thus did not prejudice the opposing party. The court granted the motion to amend the answer although it was filed several months after the notice of the mistake to the opposing party, finding that there was no bad faith on the part of the movant. The court stated, "[t]he courtroom should remain a place where truth and justice are sought, and not where attorney mistakes are used to penalize the litigants." 228 F.R.D. at 664.

Courts have also allowed additional affirmative defenses to be alleged after an answer is filed where they find no prejudice to the opposing party. *See, e.g., Carnley v. Aid to Hospitals, Inc.*, 975 F. Supp. 252, 255 (W.D. N.Y. 1997)(affirmative defenses raised for the first time in a motion for summary judgment have been allowed where the plaintiff had sufficient opportunity to respond).

VII. Discussion of Respondent's Cross Motion to Amend Answer

Respondent filed its Answer on June 2, 2006, its Prehearing Exchange on August 23, 2006, and its Amended Answer on November 13, 2006. Nine months after filing its Answer and four months after filing its Amended Answer, on March 13, 2007, Respondent provided notice to Complainant that it contested ownership and control of the Texas Facility and that it claimed exemption as a small manufacturer. Respondent did not move to amend the Answer until a month later, ten months after filing the original Answer. This is significant delay, which alone does not constitute undue delay, but must be considered along with the degree of any burden and prejudice to Complainant.

Respondent has amended its Answer once, failing to cure any deficiency in admitting allegations concerning the Texas facility, but this does not constitute "*repeated* failure to cure deficiencies by amendments previously allowed." *Foman*, 371 U.S. at 181-182 (emphasis added). Yet, considered along with the delay and other factors discussed below, the failure to cure the deficiency in the Amended Answer weighs against allowing amendment of the answer.

The next factor to consider is whether the amendment would unduly prejudice Complainant, which includes considerations of hardship to Respondent and reasons for Respondent's failure to include the denial and affirmative defense in the original answer. Denying the Cross Motion to amend the Answer would result in substantial hardship to Respondent, if Complainant's Motion for Accelerated Decision is meritorious and Respondent's other defenses are insufficient to defeat it. Respondent's reason – inadvertence -- for failing to deny ownership of the Texas facility in the Answer is not supported by any documents in the case file. Both the Answer and Amended Answer (¶ 8, 18) specifically state, "Admits that Respondent previously owned and operated 'Respondent's Texas facility . . . . '" and "Admits that Respondent manufactured (imported) more than 10,000 pounds of the listed chemical substances at Respondent's Texas facility during the latest complete fiscal year ending prior to August 25, 2002." These statements do not appear to be a simple typographical or wordprocessing error, such as misnumbering the paragraph admitted or mis-referencing a clause being admitted. There is no information in other parts of Respondent's Answer, Amended Answer, Prehearing Exchange or any other document in the case file filed prior to March 13, 2007 that suggests that Respondent intended to deny that it owned and/or operated the Texas Facility. On the other hand, Respondent's current position as to the Texas Facility does not appear to be a mere afterthought, an attempt to delay proceedings, or unsupported. Respondent has presented affidavits of Mr. Slick clearly indicating that neither Respondent nor its predecessor SNPE NA owned or controlled the Texas Facility.

Respondent's stated reason for failing to include in its Answer an affirmative defense of being a small manufacturer, that it is Complainant's burden to allege and establish that Respondent is *not* a small manufacturer as an element of its case, is not persuasive. "It has long been established that statutory exceptions constitute defenses which must be pleaded and proved by the defense." *Rosen ex rel. Egghead.com v. Brookhaven Capital Management Co. Ltd.*, 194 F. Supp. 2d 224, 227-228 (S.D.N.Y. 2002); *Dixon v. United States*, 126 S. Ct. 2437, 2445 (June

22, 2006); *United States v. Gravenmeir*, 121 F.3d 526, 528 (9th Cir. 1997)(Generally, a defendant who relies on an exception to a statute has the burden of establishing that he comes within the exception); *United States v. Freter*, 31 F.3d 783, 788 (9th Cir. 1994); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976)(a claim of immunity or exemption is in the nature of an affirmative defense); *McKelvey v. United States*, 260 U.S. 353, 357 (1922)("an indictment or other pleading founded on a general provision defining the elements of an offense, or a right conferred, need not negative the matter of an exception made by a proviso, or other distinct clause, whether in the same section or elsewhere, and . . . it is incumbent on one who relies on such an exception to set it up and establish it."); *Nicoli v. Briggs*, 83 F.2d 375, 379 (10th Cir. 1936)(noting the more strict requirements of criminal proceedings, "[a] fortiori, it is not necessary in an administrative hearing that the government negative one by one all the classes excepted by the act."); *United States v. Space Hunters, Inc.*, 429 F.3d 416, 426 (2nd Cir. 2005)(courts have consistently characterized exemptions to the Federal Housing Act as affirmative defenses).

Where any questions arise as to which party must plead and prove an exception, courts have considered that when the "'statutory prohibition is broad and the exception is narrow, it is more probable that the exception is an affirmative defense,'" and consideration is given to the relative burdens of the government and the defendant regarding the production of evidence, but the fact that the government could have proved the negative does not mean that it has the burden to prove it as an element of its case. *Gravenmeir*, 121 F.3d at 528 (quoting *United States v. Freter*, 31 F.3d 783, 788 (9th Cir. 1994); s*ee also, United States v. Cook*, 84 U.S. 168, 173-174 (1872)("In order to determine whether a fact is an element or an exception, the court must determine if it is an essential ingredient of the crime. When the statutory definition is such that the crime may not be properly described without reference to the exception, then the exception constitutes an essential element of the offense.").

In the case at hand, the small manufacturer exception set out in the regulations is a relatively narrow exception, respondents possess their financial data to prove the exception, and reference to the exception is not necessary to describe the requirement to file a Form U. Respondent's reference to the excerpt of the preamble in the 1984 Federal Register does not indicate that EPA intended to shift onto itself the burden of proof on the basis of availability of the data to EPA. EPA may use the data to identify companies *likely* to qualify for the exemption so it can avoid inspecting them in its efforts to target facilities for inspection, or, once a company asserts that it is exempt, to monitor whether it meets the exemption. Thus, the data is not necessarily used in the context of filing a complaint. *See*, 49 Fed. Reg. 45427 (Nov. 16, 1984). It is concluded that the small manufacturer exception is not an element of Complainant's case and must be raised as an affirmative defense.

As to the factor of injustice to Complainant, any prejudice from an amendment denying ownership and control of the Texas Facility defense does not rise to the level of being "undue," as the hearing is not yet scheduled, and the delay and any additional costs resulting from any additional discovery needed as to this issue does not rise to the level of unfairly disadvantaging or depriving Complainant of the opportunity to present facts or evidence which it would have offered if the amendment had been timely.

After carefully considering and weighing all these various these factors, it is concluded that Respondent will be allowed to amend its Amended Answer to deny ownership and control of the Texas Facility.

However, as to the small manufacturer defense, as discussed in detail below, Respondent has not carried its burden of proof on its motion to dismiss. Therefore, it would be futile for Respondent to amend its answer to add this defense. Accordingly, it is not necessary to address whether the defense should be waived on the basis of being untimely raised.

Accordingly, the Motion to Amend the Answer is granted with respect to the issue of ownership and control of the Texas Facility, and denied with respect to the small manufacturer defense.

VIII. Standards for Accelerated Decision

The Consolidated Rules of Practice provide that –

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a).

Accelerated decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), and therefore case law thereunder is appropriate guidance as to accelerated decision. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant* 4 E.A.D. 772, 780-82, (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148. A motion for summary judgment puts a party to its proof as to those claims on which it bears the burdens of production and persuasion.

The movant under FRCP 56(c) has an initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)(quoting FRCP 56(c)). On summary judgment, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX Technologies, Inc.,* 9 E.A.D. 61,

75 (EAB 2000).

On a respondent's motion for accelerated decision upon an affirmative defense, upon which it has the burden of proof, the respondent must present "evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it," and that entitles the respondent to judgment in its favor as a matter of law. *BWX*, 9 E.A.D. at 76.

Similarly, for the EPA to prevail on a motion for accelerated decision on liability, it must present "'evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it'" [and] "'must show that it has established the critical elements of [statutory] liability and that [the respondent] has failed to raise a genuine issue of material fact on its affirmative defense[s] . . . .' " *Rogers Corporation v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002)(quoting *BWX*, 9 E.A.D. at 76).

The EPA initially must "show that there is an absence of support in the record for the [affirmative] defense." *Id.* If the EPA makes this showing, then the respondent "as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying 'specific facts' from which a reasonable factfinder could find in its favor by a preponderance of the evidence." *Id.*

"Evidence not too lacking in probative value must be viewed in the light most favorable to the party opposing the motion." *Rogers Corporation*, 275 F.3d at 1103 (D.C. Cir. 2002). Inferences may be drawn from the evidence if they are "reasonably probable." *Id.* "Summary judgment is inappropriate when contradictory inferences can be drawn from the evidence." *Id.*

Well settled case law on FRCP 56 states that the non-movant must designate specific facts showing that there is a genuine issue for trial by presenting affidavits, depositions, answers to interrogatories, admissions on file, or other evidence. *Celotex*, 477 U.S. at 324. The motion for summary judgment places the non-movant on notice that all arguments and evidence opposing the motion, including affirmative defenses, must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164 (S.D. Ind. 1992). To avoid the summary judgment motion being granted, the non-movant must provide "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It is not sufficient if the nonmoving party's evidence is "merely colorable" or "not significantly probative." *Id.* at 249-250. While submissions must be viewed in light most favorable to the nonmovant, including one who bears the burden of persuasion on the issue, and such evidence is to be taken as true, Respondent must provide "more than a *scintilla* of evidence on a disputed factual issue to show [its] entitlement to a trial or evidentiary hearing; the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *BWX Technologies, Inc.*, 9 E.A.D. 61, 76 (EAB 2000). Summary disposition may not be avoided merely by alleging that a factual dispute may exist, or that future proceedings may turn something up. *Green Thumb Nursery, Inc.*, 6 E.A.D. 782 n. 23 (EAB 1997); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1978). "The non-movant . . . must set out, usually in an affidavit by one with knowledge of specific

facts, what specific evidence could be offered at trial." *Pure Gold, Inc.*, 739 F.2d at 627 (Fed. Cir. 1984).

IX. Discussion of Respondent's Motion to Dismiss the Complaint

One ground upon which Respondent requests dismissal is the Complainant's failure to allege that Respondent is not a small manufacturer. That argument was discussed above and found not to have merit. The remaining arguments in favor of dismissal are the proposed affirmative defense that Respondent is a small manufacturer and the defense that Respondent did not own or control the Texas Facility. These arguments in Respondent's Motion for Dismissal, and Complainant's Motion for Accelerated Decision, constitute cross motions for accelerated decision. If Respondent can establish that as a small manufacturer it was exempt from the filing requirement, or that there are genuine issues of material fact as to that issue, then Complainant cannot succeed on its Motion for Accelerated Decision. Therefore the initial analysis is whether Respondent has established that it is exempt as a small manufacturer as a matter of law.

A. The "Small Manufacturer" Issue

As noted above, Respondent acknowledges that its gross total sales in 2001 were just over $41.3 million, but argues that the figure includes more than $5.3 million from sales of chemicals manufactured by other U.S. companies, so its 2001 "total annual sales" actually were less than $36 million. This argument stems from Respondent's interpretation of "total annual revenue . .. generated by the sale of all products of a company" (the definition of "total annual sales") as the revenue generated from sale of all *chemical substances* or mixtures *manufactured* and/or *imported* by the company, on the basis of the definitions of "production volume" and "substance." See, 40 C.F.R. §704.3. Respondent's interpretation is unpersuasive for three reasons. The first reason is that the First Standard defines "small manufacturer" as a manufacturer or importer with total annual sales, "combined with those of its parent company," of less than $40 million. 40 C.F.R. 704.3. Parent companies often sell totally different types of products than their subsidiaries, so the regulatory text of the First Standard contemplates including sales from *any* products sold by the parent company, which strongly suggests that *any* products sold by the company itself are included.[5]

Secondly, the fact that the word "products" is undefined does not suggest that the definition of another related term, "production volume," should determine the meaning of "products" in the phrase "the sale of all products of a company." Instead, an undefined term

[5] A "parent company" is defined as "A company owning more than 50 percent of the voting shares of another company" (Black's Law Dictionary 579 (Abridged 5th Ed.) or that "controls [through majority voting stock ownership] or owns [wholly] another company or companies." American Heritage Dictionary (2006 ed). A classic example is General Electric Company (whose main product is electric power) being the parent company of NBC, whose products are television and radio programs.

should be interpreted according to its common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979)("A fundamental canon of statutory construction is that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") The term "product" is defined in the dictionary as something produced, and produce means to yield, make or manufacture. Webster's Third New International Dictionary at 1810 (2002). Furthermore, "statutes which are enacted for the protection and preservation of public health" are to be given "an extremely liberal construction for the accomplishment an maximization of their beneficent purposes." 3 Sutherland, Statutes and Statutory Construction, § 71.02 at 313. Principles of statutory construction are also applicable to interpretation of regulations. There is nothing in the context of the term in the definition of "total annual sales" that would suggest not to interpret it by the dictionary definition.

Thirdly, the preambles of the final regulations defining "small manufacturer" in 40 C.F.R. Part 704 indicate that sales of *all* products, not just chemical products manufactured or imported by the company, are to be included. In 1986, EPA stated in the preamble:

> The "small manufacturer" definition includes the total annual sales of parent firms and subsidiaries, if any, because EPA believes that a broadly defined sales criterion is the best available measure of a diversified firm's full financial resources available for regulatory compliance.

51 Fed. Reg. 21438, 21445 (June 12, 1986). That preamble then refers to the more complete discussion of the issue in the 1984 preamble, which states as follows:

> For purposes of these two standards [First and Second Standards in the definition of "small manufacturer"], total annual sales means the total revenue generated by the sale of all products, *including non-chemical products*, that are produced at all sites owned or controlled by the manufacturer and its parent company, if any.

49 Fed. Reg. 45425 (Nov. 16, 1984)(emphasis added). Given the undisputed fact that Respondent's gross total sales for 2001 exceeded $40 million, including sales of chemical substances imported and received domestically, Respondent cannot meet the threshold of less than $40 million in "total annual sales" to meet the small manufacturer exemption.

Respondent also cannot meet the small manufacturer exemption on the basis of its argument that EPA was required to increase the $40 million threshold to reflect the inflation index. As pointed out by Complainant, neither the regulatory text of the small manufacturer definition nor the preamble thereto *requires* EPA to make any such adjustment. The pertinent test of the definition states:

> EPA shall make use of the Producer Price Index for Chemicals and Allied Products . . . for purposes of determining the need to adjust the total annual sales values . . . . EPA may adjust the total annual sales values whenever the Agency deems it necessary to do so, provided that the Producer Price Index . . . has

> changed more than 20 percent . . . . EPA shall provide Federal Register notification when changing the total annual sales values.

49 Fed. Reg. 45425 (Nov. 16, 1984).

There is no ambiguity and no support for Respondent's argument in this text. The words "EPA *may* adjust . . . *whenever the Agency deems it necessary* . . ." clearly indicate that EPA has not imposed upon itself any requirement, but has reserved its discretion, in deciding when to adjusting the total annual sales values. EPA has, however, set conditions that must be met before exercising its discretion to change the total annual sales values: (1) EPA "shall" use the Producer Price Index (PPI) for Chemicals and Allied Products to determine the need to adjust the values, and (2) the PPI must change more than 20 percent. EPA has also set a requirement that it "shall" publish any adjustment to the total annual sales values in the Federal Register. Respondent does not assert that any such notice was published in the Federal Register. The fact that EPA has exercised its discretion to adjust values for inflation in another context, namely, to adjust maximum penalties under TSCA § 16 for inflation, does not require EPA to adjust values in the context of total annual sales. EPA may consider factors other than the mere change in the PPI to adjust values.

Assuming *arguendo* that Respondent had established that it met the threshold level of less than $40 in total annual sales, it cannot meet the second criterion within the First Standard in the definition of "small manufacturer," which states as follows:

> if the annual production or importation volume of a particular substance at any individual site owned or controlled by the manufacturer or importer is greater than 45,400 kilograms (100,000 pounds), the manufacturer or importer shall not qualify as small for purposes of reporting on the production or importation of that substance at that site . . . .

40 C.F.R. § 704.3. Thus, under 40 C.F.R. § 704.3, a manufacturer or importer with total annual sales between $4 million and $40 million does not qualify for the exemption for a particular chemical substance if its production or importation volume at the site exceeds 100,000 pounds. There is no dispute that seven chemical substances reported for Respondent's NJ Facility, and four at the Texas Facility, were manufactured (imported) in amounts above 100,000 pounds. C's Reply at 63; Bious Reply Declaration ¶¶ 37-38.

It is concluded that Respondent has failed to show any factual or legal basis that would support a finding that it was exempt from the filing requirement a small manufacturer. Accordingly, Respondent has not established any basis for dismissal of the Complaint.

As noted above, Respondent in a footnote states that it reserves its right to argue that the $36 million includes sales of non-TSCA regulated chemicals, such as pharma chemicals, which would reduce the figure further. R's Opp. & Cross Motion at 10 n. 1. Where Complainant has filed a Motion for Accelerated Decision, Respondent is put on notice that all arguments and

evidence opposing the motion, including affirmative defenses, must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164 (S.D. Ind. 1992). Therefore, Respondent must set out the specific evidence that could be offered at trial, and provide "more than a *scintilla* of evidence" that "must be substantial and probative in light of the appropriate evidentiary standard of the case." *BWX Technologies, Inc.*, 9 E.A.D. at 76. Respondent cannot reserve a second chance to provide support for a bald argument on an affirmative defense on its motion for dismissal, where such an unsupported argument does not even establish existence of a genuine issue of material fact to oppose a motion for accelerated decision. *Pure Gold, Inc.*, 739 F.2d at 627 (Fed. Cir. 1984); *Green Thumb Nursery, Inc.*, 6 E.A.D. 782 n. 23 (EAB 1997); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1978). Therefore, Respondent's footnote is of no avail.

B. Texas Facility Issue

The next issue is whether to dismiss the portion of the Complaint regarding the Texas Facility based on Respondent's defense that it did not own or control it. Respondent presents affidavits of Mr. Slick that state, "ISOCHEM NA never owned, operated and/or controlled the facility . . . described in the Complaint as 'Respondent's Texas facility,'" that "[a]t all times relevant to these proceedings, the owner of the site of the 'Texas facility' was Dow Chemical Company," that SNPE Chemicals leased the site from Dow and constructed the Texas Facility, that "SNPE Chemicals never owned any interest in ISOCHEM NA" and "ISOCHEM NA never owned any interest in either SNPE Chemicals or the 'Texas facility," and that these statements apply with equal force to the period when Respondent was named SNPE NA. Slick Declaration ¶¶ 4-6, 10-11; Slick Reply Declaration ¶¶ 5c-e. Mr. Slick also asserts in his Declaration that Mr. Bious' statements about him factually are incorrect, which Mr. Slick assumes result from misunderstandings of the conversation during the inspection. Slick Declaration ¶ 17. Respondent has presented a sworn declaration by a person with knowledge of specific facts of the testimony he would offer at a hearing, meeting its initial burden of presentation. Complainant's arguments that the statements are conclusory, self-serving and a sudden unexplained change of position do not undermine Respondent's evidence. A CEO is expected to make "self-serving" statements regarding his corporation, and he is listed as a witness and thus may be subject to cross examination at the hearing. The statements are direct and to the point, and not conclusory in the circumstances at hand. Respondent explains the discrepancy between the admission in the Amended Answer of ownership of the Texas Facility and its intent to deny that allegation, as discussed above regarding the Motion to Amend.

The Declarations submitted by the parties indicate, however, that there is a factual dispute as to what Mr. Slick said to Mr. Bious during the inspection about the Texas Facility. Mr. Bious in his Declaration and Inspection Report stated that Isochem had a phosgene derivative manufacturing business in LaPorte, Texas. Bious Declaration ¶ 6; Complainant's Initial Prehearing Exchange, Exhibit C. Mr. Slick states in his Declaration that he did not say that. Slick Declaration ¶ 19. Mr. Bious does not further address that statement in his Reply Declaration, but asserts that during the telephone call with Mr. Slick to give advance notification of the inspection, he "asked Mr. Slick whether SNPE North America was associated with the

Texas facility" and "[h]e answered in the affirmative." Bious Reply Declaration ¶¶ 10-11.

For purposes of ruling on Respondent's Motion to Dismiss, the Complainant's evidence must be taken as true and viewed in the light most favorable to Complainant. Mr. Bious' documentation in the Declarations and Inspection Report constitutes more than a scintilla of evidence and thus raises a genuine issue of material fact as to whether Respondent owned, operated and/or controlled the Texas Facility at the relevant time. Therefore, Respondent's Motion to Dismiss that part of the Complaint alleging violations concerning the Texas Facility is denied. As Respondent's Motion to Dismiss is denied in its entirety, the next analysis is Complainant's Motion for Accelerated Decision.

X. Discussion of Complainant's Motion for Accelerated Decision on Liability

A. Elements of Liability

As discussed above, each of the parties have submitted documentation in support of its position as to the ownership and control of the Texas Facility. If Respondent did not own or control the Texas Facility, then Respondent cannot be liable for the alleged violations concerning that Facility, as 40 C.F.R. § 710.28 requires "Any person who manufactured . . . a chemical substance . . . at any single site owned or controlled by that person at any time during the person's latest complete corporate fiscal year . . ." to report on the Form U. The issue of whether Respondent owned or controlled the Texas Facility during the relevant period is material to Respondent's liability for the violations alleged involving the Texas Facility. Therefore, there are genuine issues of material fact with regard to those alleged violations and Complainant's Motion is denied with respect thereto.

The question as to the remaining 14 alleged violations is whether Complainant has established the elements of liability with supporting evidence, and shown an absence of any genuine issues material fact as to liability for those alleged violations.

As noted by Complainant, the elements of liability for a violation of failure to file a Form U for 2002 under the Inventory Update Rule are:

> (1) a person
> (2) who manufactured for commercial purposes 10,000 pounds . . . or more of a chemical substance described in § 710.25 (in the Master Inventory File at the beginning of a reporting period)
> (3) at any single site owned or controlled by that person
> (4) at any time during the person's latest complete corporate fiscal year before August 25, 2002
> (5) and failed to submit the information required for each such chemical substance during the applicable reporting period, from August 25 to December 23, 2002.

40 C.F.R. §§ 710.25, 710.28(b), 710.21, 710.33.

Complainant has established that Respondent is a "limited liability company" organized in 1998 and thus a "person" under 40 C.F.R § 710.3, which definition includes "a corporation, partnership or association." Bious Declaration ¶ 8 and attached Exhibit 2. The term "manufacture" is defined in 40 C.F.R. § 710.3 to include "import for commercial purposes." Respondent's Amended Answer (at ¶ 8) states that it "Admits that Respondent 'owns, operates and/or controls' 'Respondent's New Jersey facility'." Respondent's Amended Answer states further that it "Admits that Respondent manufactured (imported) more than 10,000 pounds of the listed chemical substances at Respondent's New Jersey facility during the latest complete fiscal year ending prior to August 25, 2002." Amended Answer ¶ 17. Respondent's Amended Answer also states that it "admits the chemical substances listed in Paragraph 17 of the Complaint were included in a Form U submitted on or about November 22, 2004 . . . ." Amended Answer ¶ 23. Thus, there is no dispute that the Form U was not filed by the end of the applicable reporting period, December 23, 2002. Complainant has shown, and Respondent does not dispute, that the fourteen chemicals listed in Paragraph 17 of the Complaint were included on the Master Inventory File and were not excluded by Section 710.26. Bious Declaration ¶¶ 14, 24. It is concluded therefore that Complainant has established the elements of Respondent's liability for the fourteen chemical substances listed in Paragraph 17 of the Complaint.

B. Multiple Violations

> The Complaint alleges multiple violations in one count. Specifically, it alleges:
>
> Respondent's failure to submit a Form U including information on the chemical substances listed in paragraphs 17 and 18 [of the Complaint], by December 23, 2002, as alleged in paragraph 23 . . . constitutes multiple violations of 40 C.F.R. § 710.33(b). Each chemical substance listed in paragraph 17 . . . and not reported on Form U bu December 23, 2002, constitutes a separate violation. Each violation is a failure or refusal to comply with 40 C.F.R. § 710.33(b), which is a violation under Section 15(3)(B) of TSCA . . . .

Complainant argues that each failure to timely report each substance is a separate violation of the Inventory Update Rule, so that for the New Jersey Facility, Respondent had fourteen separate violations. Respondent disagrees, arguing that the question of number of violations is relevant to the penalty rather than liability. The question presented is whether there is a separate cause of action, or prohibited act under Section 15(3)(B) of TSCA, with respect to each chemical. This is a question of liability, not of the amount of penalty, although of course the number of violations generally affects the amount of the total penalty which may be assessed.

The Inventory Update Rule requires reporting for each chemical substance meeting the applicable criteria. The person who must report "must submit the information prescribed in this section *for each chemical substance* . . . that the person manufactured for commercial purposes

in an amount of 10,000 pounds . . . or more at a single site . . . ." 40 C.F.R. § 710.32. The Rule states that "Any person described in § 710.28(b) must report during the appropriate reporting period *for each chemical substance* described in § 710.25 that the person manufactured during the applicable corporate fiscal year . . . ." 40 C.F.R. § 710.33(b). The statute provides that it is unlawful to fail to "submit reports, notices or other information . . . as required by [TSCA] or any rule thereunder." TSCA § 15(3)(B). As noted by Complainant, Administrative Law Judges have consistently interpreted the Inventory Update Rule as setting forth separate violations for each chemical substance that was required to be reported on Form U and not timely reported. *Atlas Refinery, Inc.*, EPA Docket No. TSCA-02-99-9142, 2000 EPA ALJ LEXIS 12 (ALJ, Feb. 16, 2000); *Caschem, Inc.*, EPA Docket No. II-TSCA-PMN-89-0106, 1992 EPA ALJ LEXIS 146 (ALJ, Oct. 30, 1992); *C.P. Hall*, EPA Docket No. TSCA-V-C-61-89 (Order dated June 9, 1992).

Respondent has provided no persuasive reason for departing from this sound precedent. In its Reply Brief, Respondent argues that the failure to timely file a Form U is a single violation regardless of the number of chemical substances listed thereon. Respondent points to the text of TSCA Section 16(a), "Any person who violates a provision of section 2614 . . . shall be liable . . . for a civil penalty in an amount not to exceed $25,000 for each such violation. Respondent asserts that failure to file timely a Form U is a violation of "a provision" of Section 2614, and that there is no allegation that it omitted any chemical substances from its Form U. As discussed in *Atlas Refining, Caschem,* and *C.P. Hall*, assessment of a separate unit of violation, and thus the assessment of separate penalties, for each chemical not reported under the Inventory Update Rule is consistent with applicable statutory and regulatory language. In *Caschem*, as in the present case, only one count was alleged, containing allegations regarding multiple chemical substances.

Respondent also refers to *McLaughlin Gormley King Co.*, 6 E.A.D. 339 (EAB 1996), in which under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), a respondent was held liable for only one violation for falsification of a compliance statement (a single form) on which were multiple deviations from the Good Laboratory Practice Standards. This comparison is simply inapposite, involving clearly distinguishable facts and a different statute, as discussed in *Atlas Refining*.

C. Affirmative Defenses

The next step in the analysis is whether Complainant has shown that Respondent has failed to raise any genuine issue of material fact on the affirmative defenses, pointing out an absence of support in the record for the affirmative defenses. *Rogers Corporation v. EPA*, 275 F.3d at 1103. Complainant's Motion appears not to have addressed the four Affirmative Defenses relevant to liability for Count 1, asserted in the Amended Answer, but only addresses the proposed small manufacturer defense. Respondent did not provide any argument or evidence in support of any of them in its Prehearing Exchange. Respondent also has not referred to any of these four Affirmative Defenses in its Response to the Motion for Accelerated Decision and Cross Motion to Amend Its Answer and to Dismiss the Complaint, nor in its Reply.

As discussed above, Respondent has failed to show any factual or legal basis that would support a finding that it is exempt as a small manufacturer, so the request to amend the Amended Answer to add that defense was denied as futile, and such defense need not be considered further.

The other four Affirmative Defenses state as follows:

> (1) the Inventory Update Rule, of which 40 C.F.R. § 710.33(b) is part, does not include a "clearly-stated provision" to impose civil penalties for its violation, and therefore either no civil penalty is available for violations of the Inventory Update Rule or its provisions regarding civil penalties are so vague as to fail to provide adequate notice to persons subject to the Rule in violation of the Administrative Procedure Act and/or the Fifth Amendment to the United States Constitution;
>
> (2) the Agency is estopped from asserting the criticality of technical compliance with the four-year reporting interval by having determined that such requirement imposed an "onerous" burden and switching to a five year reporting interval;
>
> (3) the Notice of Inspection extended to sales, personnel and research data in violation of 15 U.S.C. § 2610(b)(2); and
>
> (4) that Respondent maintained the requisite records and "[i]f and to the extent Respondent failed to submit Form U . . . [by] December 23, 2002, such failure was the result of clerical error" of which Complainant was aware by November 30, 2004, and the commencement of this action is therefore barred by 40 C.F.R. § 710.1.

It could be argued that Complainant's failure to address these Affirmative Defenses in its Motion, albeit Respondent failed to support them in opposing Complainant's Motion, leaves these defenses viable, which could preclude an accelerated decision on liability. *See, Cytec Industries v. B. F. Goodrich Co.,* 232 F. Supp. 2d 821, 829 (S.D. Ohio 2002)(where statute of limitations defense was raised in answer, and not addressed in plaintiff's motion for summary judgment, but defendant merely stated in response to motion for partial summary judgment that it had asserted affirmative defenses and did not provide support for them, they were not waived). Indeed, the Supreme Court has stated that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions . . . and admissions on file, together with affidavits, if any' which it believes demonstrates the absence of any genuine issue of material fact," and the burden is on the moving party to show -- to point out to the court -- that there is an absence of evidence to support the nonmoving party's case. *Celotex v. Catrett,* 477 U.S. at 323, 325.

However, the failure of the movant to make this showing does not require denial of a motion for accelerated decision or summary judgment on liability where the non-movant utterly fails to refer to its affirmative defense in response to the motion, and furthermore, failed to

supply any supporting argument or evidence on such defense in its prehearing exchange. The Supreme Court states in *Celotex*, "One of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think that it should be interpreted in a way that allows it to accomplish this purpose." *Id*. at 323-234. "[I]n cases where there is an absence of evidence to support an essential element of a defense, with respect to that defense 'there can be no "genuine issue as to any material fact" since a complete failure of proof concerning an essential element of the [affirmative defense] necessarily renders all other facts immaterial.'" *FDIC v. Giammettei*, 34 F.3d 51, 54-55 (2nd Cir. 1994)(quoting *Celotex*, 477 U.S. at 323). As one court has stated, when a party moves for summary judgment on liability,

> the non-movant is thereby placed on notice that *all* arguments and evidence opposing a finding of liability must be presented to properly resolve that issue . . . A summary judgement on the issue of liability encompasses all affirmative defenses and implicitly challenges that non-movant to establish a basis for finding that the defenses are both applicable and supported by the [sic] sufficient facts. . . . . At any stage of a proceeding, the defendant bears the burden of raising and proving its affirmative defenses. . . . [G]iven the scope of judgment on the issue of liability, it is illogical to imagine in what kind of legal "limbo" holds "unargued" affirmative defenses after a judgment on liability issues.

Pantry, Inc. v. Stop-N-Go Foods, 796 F. Supp. 1164, 1166-1167 (S.D. Ind. 1992)(emphasis in original).

Courts have held that affirmative defenses were abandoned, waived or insufficient to defeat a motion for summary judgment when not supported by the defendant in response to the motion, even where the plaintiff did not specifically refer to them in its motion. *Pandrol USA LP v. Airboss Railway Products*, 320 F.3d 1354, 1367-8 (Fed. Cir. 2003)(where plaintiff requested summary judgment as to all defendants, it was defendant's responsibility to present arguments on its defense that some defendants are not responsible for violations; failure to do so results in waiver of the defense); *Terra Industries, Inc. v. National Union Fire Insurance Co.*, 383 F.3d 754, 760 (8th Cir. 2004)(where defendant relies on an exclusion as an affirmative defense, it is defendant's burden, not plaintiff's burden, to point to some evidence as to the exclusion; mere allegations are insufficient to avoid summary judgment); *General American Life Insurance Co. v. Am South Bank*, 100 F.3d 893 n. 2 (11th Cir. 1996)(Where only mention of affirmative defenses upon summary judgment motion is in defendant's brief, but it fails to explain what genuine issues of material fact they may raise, they are not considered and summary judgment is granted in favor of plaintiff); *Diversey Lever Inc. v. Ecolab Inc*, 191 F.3d 1350 (Fed. Cir. 1999)("an affirmative defense must be raised in response to as summary judgment motion, or it is waived."); *Blue Cross & Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1550 (11th Cir. 1990)(defendant's vague assertion of statute of limitations defense in answer is insufficient to defeat plaintiff's motion for summary judgment, where the defense was not mentioned in the summary judgment record; defendant failed its initial burden of making a showing the defense is applicable); *Holland v. United* States, 74 Fed. Cl. 225 (Ct.Cl. 2006)(discussing cases)*; cf., Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th

Cir. 1995)("The onus is upon the parties to formulate the arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned.")

The conclusion that accelerated decision may be granted in favor of complainant where neither party refers to affirmative defenses upon complainant's motion for summary judgment or in the prehearing exchange, is supported by the Rules of Practice, 40 C.F.R. §22.24(a), which states, "Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations . . . and has the burdens of presentation and persuasion for any affirmative defenses." It is therefore concluded that the four Affirmative Defenses (First, Second, Third and Fourth Affirmative Defenses) are deemed abandoned.

In any event, Respondent would be unable to succeed on any of the four Affirmative Defenses even if they were not deemed abandoned. As to the First Defense, the Inventory Update Rule clearly requires manufacturers or importers as described therein to submit certain information, Section 15(3)(B) of TSCA provides that it is unlawful to fail to "submit reports, notices or other information . . . as required by [TSCA] or a rule thereunder" which would include the Inventory Update Rule, and Section 16(a) of TSCA provides that "[a]ny person who violates a provision of section 2614of this title [TSCA§ 15] shall be liable . . . for a civil penalty. . . ." Generally, specific requirements are set out in the regulation, and the authority of the Agency to assess penalties is set out in the statutes. No vagueness or lack of notice is apparent.

As to the Second Defense, Respondent must meet the difficult standard of establishing equitable estoppel against the Government, that is, to prove that Respondent reasonable relied upon Complainant's actions to its detriment, and that the Government engaged in some affirmative misconduct. *BWX Technologies*, 9 E.A.D. 61, 80 (EAB 2000)(citing *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995). Respondent is required under 40 C.F.R. § 22.19(a)(2) to include in its Prehearing Exchange "a brief narrative summary" of witnesses' expected testimony and "[c]opies of all documents and exhibits which it intends to introduce into evidence at the hearing," and Respondent has the burdens of presentation and persuasion with respect to all affirmative defenses, yet Respondent has not included any document or summary of testimony that could support the Second Defense in its Prehearing Exchange.

As to the Third Defense, Section 2610 of TSCA provides that "No inspection under subsection (a) of this section shall extend to (A) financial data (B) sales data (other than shipment data), (C) pricing data, (D) personnel data, or (E) research data (other than data required by this chapter or under a rule promulgated thereunder), unless the nature and extent of such data are described with reasonable specificity in the written notice required by subsection (a). . . ." Respondent submitted the Notice of Inspection as Exhibit R3 in its Prehearing Exchange, which Notice shows boxes checked indicating the inspection extends to sales, personnel and research data, and for the nature and extent of inspection of such data, states "data needed to document compliance with TSCA." While this description does not appear to be "with reasonable specificity," Respondent has not included in its Prehearing Exchange any document or summary of testimony which could indicate that the inspection in fact did extend to sales data other than shipment data, personnel data, or such research data other than that required

under TSCA or a rule thereunder.

As to the Fourth Defense, Respondent does not cite to any portion, paragraph or clause of Section 710.1 which would bar commencement of this action. Upon reading Section 710.1, the only portion that could be pertinent to Respondent's allegation that the failure to report timely was a clerical error is a parenthetical statement in Section 710.1(c) that "EPA does not intend to concentrate its enforcement efforts in insignificant clerical errors in reporting." This is merely a statement of EPA's intention in exercising its discretion in targeting inspections and enforcement, and cannot be considered a binding limitation that could bar an enforcement action. Moreover, filing a Form U two years late cannot reasonably be considered merely a "clerical error."

Accordingly, Respondent is found liable as alleged in the Complaint for failure to file a timely Form U for 2002 for the fourteen chemical substances imported at the New Jersey Facility, and therefore has violated 40 C.F.R. § 710.33(b) and Section 15(3)(B) of TSCA in regard to each such substance.

ORDER

1. Respondent's request for oral argument is **DENIED.**

2. Respondent's Cross-Motion to Amend its Answer is **GRANTED in part**, with respect to Respondent's request to amend the Amended Answer to deny that it "formerly owned, operated and/or controlled" the Texas Facility.

3. Respondent's Cross-Motion to Amend its Answer is **DENIED in part**, with respect to Respondent's request to amend the Amended Answer to add an affirmative defense of exemption as a small manufacturer.

4. On or before **January 4, 2008**, Respondent shall file a Second Amended Answer identical to that included as an attachment to its Response in Opposition to Complainant's Motion for Accelerated Decision and Cross-Motion to Amend Its Answer and Dismiss the Complaint, EXCEPT THAT it shall omit the Seventh Affirmative Defense.

5. Respondent's Cross-Motion to Dismiss the Complaint is **DENIED.**

6. Complainant's Motion for Accelerated Decision on Liability is **GRANTED in part,** as to Respondent's liability for failure to file timely a Form U for the 2002 reporting period for the fourteen chemical substances imported at the Respondent's New Jersey Facility, listed in the Complaint Paragraph 17.

7. Complainant's Motion for Accelerated Decision on Liability is **DENIED in part,** as to

Respondent's liability for the alleged failure to file timely a Form U for the 2002 reporting period for the five chemical substances manufactured or imported at the Texas Facility, listed in the Complaint Paragraph 18.

8. The parties shall attempt in good faith to settle this matter. In the event a settlement is not reached beforehand, the parties shall proceed to a hearing in this matter on the issues of penalties to assess for the fourteen violations upon which Respondent is found liable herein, and on the issues of Respondent's liability and any penalties to assess for the alleged failure to file timely a Form U for the 2002 reporting period for the five chemical substances manufactured or imported at the Texas Facility.

9. On or before **January 25, 2008** the parties shall file any Supplemental Prehearing Exchanges they deem necessary, including a statement as to which of the witnesses listed in the existing Prehearing Exchanges are currently intended to be called to testify at the hearing.

10. By **February 1, 2008**, the parties shall file a Joint Set of Stipulated Facts, Exhibits, and Testimony. The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

11. All pre-hearing motions, such as motions to amend and motions in limine, must be filed on or before **February 8, 2008**.

12. The parties may, if they wish, file prehearing briefs. The deadline for filing such briefs is Friday, **February 22, 2008**. The Complainant's brief should specifically state each claim in the Complaint which is to be tried at the hearing and which claims are not. The Respondent's brief should identify each of the defenses the Respondent intends to pursue at the hearing.

13. The Hearing in this matter will be held in New York City beginning promptly at 9:30 a.m. on Tuesday, **March 5, 2008** and continuing if necessary, on March 6-8, 2008. The Regional Hearing Clerk will make appropriate arrangements for a courtroom. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

> Individuals requiring special accommodations at the hearing, including wheelchair access, should contact the Regional Hearing Clerk, as soon as possible so that appropriate arrangements can be made.

THE RESPONDENT IS HEREBY ADVISED THAT FAILURE TO APPEAR AT THE HEARING, WITHOUT GOOD CAUSE BEING SHOWN THEREFOR, MAY RESULT IN A DEFAULT JUDGMENT BEING ENTERED AGAINST IT.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS

GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

_____
Susan L. Biro
Chief Administrative Law Judge

Dated: December 27, 2007
Washington, D.C.